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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-502

RAYMOND D. LOUVIERE AND
MRS. RAYMOND D. LOUVIERE

versus

SHELL OIL COMPANY, THERMODISC, INC., E. L. WEIGAND COMPANY, TXT STEAM CORP. (A/K/A TELSTEAM CORP.), AVONDALE SHIPYARDS, INC., CARRIER CORP. DAY AND NIGHT MANUFACTURING COMPANY, PNEUMATIC SERVICE AND EQUIPMENT COMPANY, TRAVELERS INSURANCE COMPANY, PACIFIC INDEMNITY COMPANY, TELEDYNE, INC., ARGONAUT INSURANCE COMPANIES, INSURANCE COMPANY OF NORTH AMERICA, BROWN AND ROOT, INC., ALEXANDER SHIPYARD, INC. (NOW AMERICAN MARINE CORPORATION) and and SUPERIOR OIL COMPANY

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CASES STATUTES AND OTHER AUTHORITIES ..... II

CITATIONS TO OPINIONS BELOW ..... 2

JURISDICTION ..... 2

QUESTION PRESENTED ..... 2

STATUTES INVOLVED ..... 3

STATEMENT OF THE CASE ..... 8

JURISDICTION OF THE COURT BELOW ..... 9

REASONS FOR GRANTING WRITS ..... 10

I. CONFLICTING OPINIONS NOW EXIST IN THE FIFTH CIRCUIT AND OTHER CIRCUIT COURTS OF APPEALS ON THE IMPORTANT QUESTION OF THE NATURE AND EXTENT OF SUBSTANTIVE AND PROCEDURAL RIGHTS OF EMPLOYERS, SUBROGATED INSURERS AND EMPLOYEES UNDER SECTION 33 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT. ..... 10

TABLE OF CONTENTS (Continued)

Page

II. THE HOLDING OF THE FIFTH CIRCUIT COURT OF APPEALS THAT SECTION 33 OF THE ACT IS NOT THE EXCLUSIVE SOURCE OF THIRD PARTY REMEDIES, AND ITS ADOPTION OF LOUISIANA WORKMEN'S COMPENSATION STATUTORY LAW AND THE CIVIL LAW ACTION OF "DE IN REM VERSO" AS SURROGATE FEDERAL LAW THEREUNDER CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AND THE ACT'S LEGISLATIVE HISTORY ..... 14

A. The conflict with applicable decisions of this Court. ..... 14

B. The conflict with the legislative history of Section 33 of the Act. ..... 20

CONCLUSION ..... 27

CERTIFICATE ..... 28

## TABLE OF AUTHORITIES


Page

I. *Statutes:*

United States Statutes:

44 Stat. 1440, Act of March 4, 1927, ch. 509 ..... 21
52 Stat. 1168, Act of June 25, 1938, ch. 685, §12 ..... 21
86 Stat. 1263, Public-Law 92-576, §18(a) ..... 18

United States Code:

43 U.S.C. §1332(a) ..... 3

43 U.S.C. §1333(a)(1) ..... 3

43 U.S.C. §1333(a)(2) ..... 3, 20

43 U.S.C. §1333(b) ..... 4

43 U.S.C. §1333(c) ..... 4

33 U.S.C. §905 ..... 18

33 U.S.C. §914(a) ..... 4

33 U.S.C. §914(b) ..... 5, 26

33 U.S.C. §914(h) ..... 5

33 U.S.C. §919(a) ..... 5, 10

33 U.S.C. §919(b) ..... 5, 10

33 U.S.C. §919(c) ..... 6

TABLE OF AUTHORITIES (Continued)


Page

33 U.S.C. §933(a) ..... 6

33 U.S.C. §933(b) ..... 7

33 U.S.C. §933(e) ..... 7, 22

33 U.S.C. §933(h) ..... 7

Louisiana Revised Civil Code of 1870:

Article 3536 ..... 8

II. *Cases:*

Allen v. Texaco Inc. 510 F.2d 977 (5th Cir. 1975) ..... 23, 25, 26

American Stevedores, Inc. v. Porello 330 U.S. 446 91 L Ed. 10111 (1946) ..... 21

Doleman v. Levine 295 U.S. 221, 79 L Ed. 1402 (1934) ..... 14, 21, 22, 23

Federal Marine Terminals, Inc. v. Burnside Shipping Co. 394 U.S. 404, 22 L Ed. 2d 371 (1969) ..... 15, 16, 17, 18, 19

Joyner v. F & B Enterprises, Inc. 448 F.2d 1185 (D.C. Cir. 1971) ..... 11, 12

Liberty Mutual Insurance Company v. United States 290 F.2d 257 (2nd Cir., 1961) ..... 10, 11

Page

Louviere v. Shell Oil Company, et al 509 F.2d 278 (5th Cir. 1975), rehearing denied, per curiam 515 F.2d 571 ..... 2, 20, 21, 43

Potomac Electric Power Company v. Wynn 343 F.2d 295 (D.C. Cir. 1965) ..... 26

Rodrigue v. Aetna Casualty & Surety Company 395 U.S. 352, 23 L Ed. 2d 360 (1969) ..... 19

Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp. 350 U.S. 124, 100 L Ed. 133 (1956) ..... 16, 19

III. *Miscellaneous Texts and Treatises:*

United States Code Congressional and Administrative News, Vol. 3, 92nd Congress, 2nd Session, 1972 ..... 18, 19

United States Government Documents
Senate Report No. 428 (1959) 86th Congress, 1st Session ..... 21, 22, 25, 26

House Report No. 92-1441, 92nd Congress, 2nd Session (1972) ..... 18, 19

IN THE
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SHELL OIL COMPANY, THERMODISC, INC.,
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SHIPYARDS, INC., CARRIER CORP. DAY AND
NIGHT MANUFACTURING COMPANY,
PNEUMATIC SERVICE ANDEQUIPMENT
COMPANY, TRAVELERS INSURANCE
COMPANY, PACIFIC INDEMNITY COMPANY,
TELEDYNE, INC., ARGONAUT INSURANCE
COMPANIES, INSURANCE COMPANY OF
NORTH AMERICA, BROWN AND ROOT, INC.,
ALEXANDER SHIPYARD, INC. (NOW
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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American Marine Corporation, a defendant in the captioned cause, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 6, 1975 (original decision) and on July 3, 1975 (per curiam denial of rehearing).

## CITATIONS TO OPINIONS BELOW

The judgment and opinion of the District Court are unreported and are reproduced in the supplement beginning at p. 31 and p. 35 respectively. The opinion of the United States Court of Appeals for the Fifth Circuit dated March 6, 1975 (Circuit Judges Wisdom and Bell, and District Judge Brewster) is reproduced in the supplement beginning at p. 43 and is reported in 509 F.2d 278. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing, dated July 3, 1975, is reproduced in the supplement beginning at page 59, and is reported in 515 F.2d 571.

## JURISDICTION

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit denying rehearing in this cause was entered on July 3, 1975. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), 62 Stat. 928.

## QUESTION PRESENTED

Whether the Longshoremen's and Harbor Workers' Compensaton Act, as a body of federal laws, provides the exclusive remedy for an employer or its subrogated insurer to recoup compensation payments voluntarily made to an employee in the absence of a Section 33 statutory assignment? Subsidiary to this question, if there is a "gap" in the Longshoremen's and Harbor Workers' Compensation Act with respect to recoupment remedies against third parties by a non-statutory assignee employe, or its subrogated insurer, are Louisiana's workmen's compensation

statutory law, the Civil Law theory of "de in rem verso" and Louisiana's substantive law of interruption of prescription, all of which purportedly collectively recognize an independent indemnification action by a non-statutory assignee, compatible with the scheme of the Longshoremen's and Harbor Workers' Compensation Act and applicable as surrogate federal law thereunder?

## STATUTES INVOLVED

43 USC §1332(a):

"It is declared to be the policy of the United States that the subsoil and seabed of outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter."

43 USC §1333(a) (1):

"The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . ."

43 USC §1333(a) (2):

"To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the

United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each . . ."

43 USC §1333(b):

"The United States district courts shall have original jurisdiction of cases and controversies arsing out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such case or controversy may be instituted in the judicial district of the adjacent State nearest the place where the cause of action arose."

43 USC §1333(c):

"With respect to disability or death of an employee resulting from any injury occurring as a result of operations described in subsection (b) of this section, compensation shall be payable under the provisions of the Longshoremen's and Harbor Worker's Compensation Act. . . ."

33 USC §914(a):

"Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer."

33 USC §914(b):

"The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period."

33 USC §914(h):

"The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties."

33 USC §919(a):

"Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."

33 USC §919(b):

"Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by

the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail."

33 USC §919(c):

"The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon applications of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order reject the claim or make an award in respect of the claim."

33 USC §933(a):

"If an account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

33 USC §933(b):

"Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

33 USC §933(e):

"All amounts paid as compensation: the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or the representatipe; and the employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer."

33 USC §933(h):

"Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

## STATEMENT OF THE CASE

Raymond Louviere insituted this proceeding in the United States District Court for the Eastern District of Louisiana to recover damages for personal injuries he allegedly sustained as a result of an explosion occurring on May 6, 1970, on a fixed drilling platform located on the outer continental shelf in the Gulf of Mexico adjacent to Louisiana's coast. At the time of the explosion, Louviere was employed by Movible Offshore, Inc., which carried compensation with the Argonaut Insurance Company.

Subsequent to the explosion, Louviere accepted compensation payments voluntarily made to him by Argonaut without a formal award being entered by the Department of Labor. Within one year from the date of the explosion, Argonaut instituted suit[1] in the United States District Court for the Estern District of Louisiana seeking to recover from several third parties the compensation payments it informally made to Louviere.

Almost three years after the subject explosion occurred, Louviere brought this suit against eighteen (18) defendants, alleging all were responsible in one manner or another for the explosion and his resultant injuries.

Defendants named in Louviere's Complaint filed motions to dismiss in the District Court alleging that Louviere's action had prescribed by virtue of the one year prescriptive period provided by Louisiana law.[2] Louviere

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[1] *Argonaut Insurance Company v. Shell Oil Company, et al.*, No. 71-1265 on the docket of the United States District Court, Eastern District of Louisiana.

[2] Article 3536, Louisiana Revised Civil Code of 1870, which provides in pertinent part: "The following actions are also prescribed by one year: That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses.***"

countered those motions by arguing that Argonaut's suit to recover compensation payments voluntarily made to him was sufficient to interrupt prescription on his third party tort action.

The District Court maintained the motions to dismiss with written reason assigned,[3] holding that Louviere retained the exclusive right under Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act[4] to initiate a third party action, and that his right to do so had prescribed by virtue of Louisiana's one year prescriptive period.

The Fifth Circuit Court of Appeals reversed the District Court, holding that Section 33 of the Act did not provide the exclusive source of remedies to recoup compensation payments from third parties, and that Argonaut's suit effected an interruption of prescription on Louviere's cause and right of action against the alleged party tortfeasors.[5]

## JURISDICTION OF THE COURT BELOW

Jurisdiction of this action is grounded upon 43 U.S.C. §1333, the Outer Continental Shelf Lands Act, which extends coverage of the Longshoremen's and Harbor Workers' Compensation Act to accidents occurring on fixed platforms such as the one involved here.

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[3] The decision of the District Court is unreported but is reproduced in the Supplement beginning at p. 35.

[4] 33 USC §901 et seq., hereinafter referred to as the "Act."

[5] 509 F.2d 278 (5th Cir., 1975)

## REASONS FOR GRANTING WRITS

### I.

### CONFLICTING OPINIONS NOW EXIST IN THE FIFTH CIRCUIT AND OTHER CIRCUIT COURTS OF APPEAL ON THE IMPORTANT QUESTION OF THE NATURE AND EXTENT OF SUBSTANTIVE AND PROCEDURAL RIGHTS OF EMPLOYERS, SUBROGATED INSURERS AND EMPLOYEES UNDER SECTION 33 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

The important question of whether a non-statutory assignee has an independent right to initiate a third party action to recover compensation payments made to an employee depends upon an interpretation of the language of Section 33 of the Act, which provides in pertinent part:

> "(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> "(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award."

Both the Second Circuit Court of Appeals[6] and the Dis-

[6] Liberty Mutual Insurance Company v. United States, 290 F.2d 257 (2nd Cir., 1961)

trict of Columbia Circuit Court of Appeals[7] have considered this question and held or indicated that the Act provides the exclusive remedy for an employer or its subrogated insurer to recoup compensation payments, and that a non-statutory assignee has no independent action to recoup the same from third parties. In *Liberty Mutual Insurance Company vs. United States*,[8] a longshoreman was injured in March, 1958 while on board a vessel owned by the defendant, United States. Compensation payments to the longshoreman were voluntarily commenced by his employer's insurance carrier, with a formal award being entered in November, 1959. In March, 1960, the compensation carrier instituted suit against the United States as a third party tortfeasor seeking recovery of the payments to the longshoreman. The suit was filed four months after the award was entered, and eleven days prior to the expiration of a two year statutory limitation period within which the longshoreman could institute a third party action. The defendant, United States, alleged that the insurer had no right to institute an independent action in the absence of a statutory assignment, which would not occur until six (6) months from the date of the entry of the award. The District Court dismissed the action and the compensation insurer appealed. The Second Circuit Court of Appeals, in affirming the District Court's holding that a non-statutory assignee had no right to bring the independent action, looked to the express language of Section 33 of the Act, and held in part as follows:

> "We hold that during the six month period within which the employee retains the cause of action neither the employer or its subrogated compensation carrier may initiate an action against

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[7] Joyner v. F & B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir., 1971)
[8] 290 F.2d 257 (2nd Cir., 1961)

> an alleged third party tortfeasor, but, of course, can obtain reimbursement for compensation payments out of any sum the employee may recover in a suit initiated by him during that time."[9]

To the same effect is the decision of the District of Columbia Circuit in *Joyner v. F & B Enterprises, Inc.*[10] There, compensation payments were voluntarily made to the longshoreman by the employer's insurance carrier without a formal award being entered by the Deputy Commissioner. The longshoreman initiated a third party action; a defendant named therein filed a motion seeking to join the insurance carrier involuntarily as a plaintiff in the action. The question of whether the compensation carrier must be joined as a real party in interest was certified to the Court of Appeals, which held that the insurance carrier was not a real party in interest in the absence of a statutory assignment. The Court held the inurer could not be involuntarily impleaded thusly:

> "Only if American [compensation carrier] had obtained a formal award of benefits and Joyner [longshoreman] had not commenced a third party action within six months of the entry of the award, would American have a substantive right directly against the third party tortfeasor. This being the case, American is not a 'real party in interest' in Joyner's suit against the third party tortfeasor."[11]

Accordingly, Section 33 of the Act is interpreted in the Second and District of Columbia Circuits *on facts similar to those now before this Court* to provide the exclusive

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[9] 290 F.2d at p. 258
[10] 448 F.2d 1185 (D.C. Cir., 1971)
[11] 448 F.2d at p. 1188.

source of the right to initiate a third party action: In the absence of a formal assignment of the employer, or its subrogated insurance carrier, the employee retains "all right . . . to recover damages against such third person[s]".[12]

The Fifth Circuit, however, in reversing the District Court, holds that Section 33 is non-exclusive as to third party remedies:

> ". . . We therefore hold that in the circumstances this case presents the employer who pays compensation without an award is not barred by Section 33 from pursuing whatever non-statutory rights he may have against third party wrongdoers."[13]

By virtue of the Fifth Circuit's reversal of the District Court's decision in this case, the right to initiate a third party action under Section 33 in the Fifth Circuit will be non-exclusive, resulting in inconsistent applications between the Circuits of substantive and procedural rights under Section 33 of the Act as against third party tortfeasors. It necessarily follows that the judgment below must be examined by this Court. Accordingly, it should issue the requested writ and resolve the conflict now existing between the Circuits by holding the Act to be the exclusive source of remedies against third parties, and that non-statutory assignees have no right thereunder to institute suit against third parties to recoup compensation benefits paid.

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[12] 33 U.S.C. §933(b).

[13] 509 F.2d at p. 284

## II.

## THE HOLDING OF THE FIFTH CIRCUIT COURT OF APPEALS THAT SECTION 33 OF THE ACT IS NOT THE EXCLUSIVE SOURCE OF THIRD PARTY REMEDIES, AND ITS ADOPTION OF LOUISIANA WORKMEN'S COMPENSATION STATUTORY LAW AND THE CIVIL LAW ACTION OF "DE IN REM VERSO" AS SURROGATE FEDERAL LAW THEREUNDER CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, AND THE ACT'S LEGISLATIVE HISTORY.

### A.

### *The conflict with applicable decisions of this Court*

In *Doleman v. Levine*,[14] this Court held *on facts apposite to this proceeding* that a subrogated insurer which was not a statutory assignee had no right under Section 33 to assert an independent indemnity claim to recover compensation payments from a third party tortfeasor. In *Doleman*, the subrogated insurer brought an independent action to recoup compensation payments made to one of several dependents of a deceased longshoreman whose claim was assigned to the insurer under Section 33 of the Act; other dependents refused compensation payments and elected to pursue their own third party actions. This Court held that because there had only been a partial assignment of the deceased longshoreman's cause of action against third parties, the insurer, *as a matter of federal law*, had no substantive right under Section 33 to assert the indemnity action against third parties. Permitting the claim, stated this Court, would, in effect, split the longshoreman's cause of action:

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[14] 295 U.S. 221, 79 L.Ed. 1402 (1934)

> ". . . But the Section [33] does not purport to split the cause of action. A purpose to do violence to the firmly grounded tradition of the unity of a cause of action at law, by casting on the defendant the burden of defending two suits, is hardly to be implied."[15]

Just as the *Doleman* subrogated insurance carrier could not sue as a partial assignee, Argonaut cannot now be held to have an independent indemnity claim the complete absence of a statutory assignment. The Fifth Circuit's recognition of an independent indemnity action by Argonaut under Section 33 of the Act effectively splits Louviere's cause of action against third party tortfeasors, exposes those third parties to a multiplicity of litigation and opens the door to double recovery by Louviere, all of which was proscribed by this Court in the *Doleman* case.

The Fifth Circuit predicated its reversal of the District Court's dismissal of Louviere's Complaint on this Court's decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*[16] It is submitted that *Burnside* is inapposite both factually and legally because it involved a tripartite relationship of a vessel owner, stevedore and longshoreman, and was decided upon a federal maritime implied warranty cause of action that has since been abolished by legislative amendment to the Act.

In *Burnside*, a longshoreman was killed on board a vessel while performing his employment duties; his widow accepted compensation payments *under a formal award*, but within six months of the award brought a worngful death action against the shipowner. The shipowner

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[15] 295 U. S. at p. 226.
[16] 394 U.S. 404, 22 L.Ed. 2d 371 (1969)

brought a separate action in the same federal court seeking indemnification from the longshoreman's employer, who counterclaimed for its compensation payments, alleging the shipowner had breached its *Ryan*[17] duty owned to the stevedore to provide a safe place to work. This Court held, reversing the District Court and Court of Appeals, that Section 33 of the Act was non-exclusive as to the source of third party remedies, and recognized, as a matter of maritime federal law, the availability of the *Ryan* indemnity action by the stevedore against the vessel owner:

> "We hold only that federal maritime law does impose on the shipowner a duty to the stevedoring contractor of due core under the circumstances, and does recognize a direct action in tor against the shipowner to recover the amount of compensation payments occasioned by the latter's negligence.
>
> This holding is in on wise a departure from our decision in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp. 342 U.S. 202, 285 96 L.Ed. 318, 320, 72 S. Ct. 277 that we would not 'fashion new judicial rules of contribution between the shipowner and the stevedoring contractor as joint tortfeasors. Marine Terminals [stevedore] is not asking Burnside [shipowner] to share responsibility for their joint neglignece with respect to McNeil [deceased longshoreman]. Rather the counterclaim seeks recovery of the full amount of Marine Terminals liability under the Act to McNeil's representative; *and it is founded not on independent wrong to Marine Terminals.*"[18]

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[17] *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U.S. 124, 100 L.Ed. 133 (1956).

[18] 394 U.S. at pp. 417-418.

The Fifth Circuit found *Burnside* to be controlling and held:

> "[T]he contention that Section 33 of the Act should be construed as providing the sole remedy of an employer against third persons preempting other non-statutory remedies, was addressed [in *Burnside*] and rejected . . ."[19]
>
> * * *
>
> "In short, we find nothing in the statutory scheme or its legislative history that requires leaving the employer who voluntarily pays compensation without a remedy against culpable third parties. On the contrary, we conclude that such a holding would frustrate the congressional objectives of providing prompt compensation to injured employees and of placing the ultimate burden of loss on the party at fault. We therefore hold that in the circumstances this case presents the employer who pays compensation without an award is not barred by Section 33 from pursuing *whatever* nonstatutory rights he may have against third party wrongdoers."[20] [Emphasis added]

The District Court, *ex proprio motu*, considered whether *Burnside* was apposite, but rejected its applicability both factually and legally. With respect to the legal distinction, the District Court stated:

> "With respect to the legal distinction between these two cases, the Court concludes, in light of the factual situation, that Argonaut, even it had desired, could not have pursued an independent right of action against third parties, since

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19 509 F.2d at p. 282.
20 509 F.2d at p. 284.

no independent right of action exists. *Burnside* does not constitute legal authority for application of the doctrine allowing an independent right of action beyond cases which involve the triad of stevedore-longshoreman-vesselowne r. See generally, *Liberty Mutual Insurance Co. v. Fruehauf Corp.*, 472 F.2d 69 (6th Cir. 1972). It also should be noted that the courts have been reluctant to extend the recognition of the special legal relationship of *Ryan* on the theory of implied warranty of workmanlike services beyond this pripartite relationship. *Cf. Ocean Drilling & Exploration v. Berry Bros. Oilfield Service*, 377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849, 88 S.Ct. 102 (1967)."[21]

This proceeding does not involve a *Ryan* tripartite relationship of a vessel owner, stevedore, and longsohreman. Therefore, the *Ryan* indemnity action recognized and applied in *Burnside* as a matter of federal maritime law is clearly inapposite. Significant also to the distinction of *Burnside* from this proceeding is the legislative history regarding the 1972 amendments[22] to Section 5[23] of the Act. Those amendments abolished the *Ryan* doctrine indemnification action which was the predicate of the independent action recognized and applied by this Court in *Burnside*.

Even though the negligence remedy under Section 33 of the Act was preserved, Congress intended that it should

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[21] See Unreported opinion of the District Court, Supplement, at p. 40.

[22] Public Law 92-576, §13(a), 86 Stat 1263, amending 33 U.S.C. §905, "The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine. . ." House Report No. 92-1441 (1972); 1972 United States Code Congressional and Administrative News, 92nd Congress, 2nd Session, at p. 4704.

[23] 33 U.S.C. §905.

be applied uniformly in all states, as is evident from these remarks of the Congressional committee drafting the 1972 amendment bill:

> "[T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently and in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law . . ."[24]

Both the absence of a *Ryan* triad and the legislative abolition of the *Ryan* federal maritime indemnification action manifest the inapplicability of the *Burnside* case to this proceeding. In the absence of such a coextensive *federal* action of indemnity (assuming only *arguendo* that Section 33 is still non-exclusive even in the demise of the *Burnside* indemnification action) the express provisions of Section 33 of the Act providing that the employee retains all rights against third parties in the absence of a statutory assignment must be applied as *federal* law; the net result of Fifth Circuit's failure to do so is that Louisiana statutory and decisional law have been substituted in the place of statutory law of the United States.

Additionally, since the Act is a body of federal laws, the existence and source of third party remedies, whether arising under or outside of Section 33 are questions of federal law arising thereunder. In accordance with the pronouncements of this Court in *Rodrigue v. Aetna Casualty & Surety Company*[25] construing Section 1333(a) (2)

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[24] House Report No. 92-1441 (1972), 1972 United States Code, Congressional and Administrative News, 92nd Congress, 2nd Session, at p. 4705.

[25] 395 U.S. 352, 23 L. Ed. 2d 360 (1969)

of the Outer Continental Shelf Lands Act,[26] in order for state law to be applicable under the Act, there must both be a "gap" in the Act with respect to third party remedies, and state law to be applied to fill such a gap must not be inconsistent or incompatible with the Act. In recognizing a non-statutory independent substantive action by the insurer, the Fifth Circuit Court of Appeals found a "gap" only by disregarding the express language of Section 33 providing that in the absence of a statutory assignment the employee retains all rights against third parties. The Fifth Circuit filled the "gap" it judicially created in Section 33 with Louisiana workmen's compensation statutory law, the Civil Law theory "de in rem verso" and Louisiana decisional law of interruption of prescription, all of which are inconsistent and incompatible with the Congressional intent of uniform application of negligence remedies under Section 33 of the Act, as manifested by its legislative history. In doing so, Louisiana's statutory and decisional law have now become paramount to the express provisions of federal statutory law.

**B.**

*The conflict with the legislative history of Section 33 of the Act*

In reversing the District Court, the Fifth Circuit Court of Appeals found "nothing in the statutory scheme or its legislative history that requires leaving the employer who voluntarily pays compensation without a remedy against culpable third parties".[27] It further held that the "congressional objectives of providing prompt compensation to injured employees and placing the ultimate burden of

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[26] 43 U.S.C. §1333(a) (2)

[27] 509 F.2d at p. 284

loss on the party at fault"[28] would be frustrated unless the employer or its insurer voluntarily paying compensation has an independent right of indemnification. It is submitted that the Court of Appeals misapprehended the legislative history of Section 33 and the statutory scheme of the Act to reach these conclusions.

Section 33, as originally enacted in 1927, as amended in 1938, and as amended in 1959,[29] has never purported to provide the employee with double compensation. This Court recognized in the *Doleman* case that permitting the employer or its insurer to institute an independent indemnification action under Section 33 as it read after amendment in 1938 would split the cause of action, creating the possibility of double recovery:

> "But the Section does not purport to split the cause of action, the purpose to do violence to the firmly grounded tradition of the unity of a cause of action at law, by casting on the defendant the burden of defendant's two suits is hardly to be implied."[30]

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[28] Id.

[29] Section 33, as originally enacted, provided that acceptance of any compensation operated as an automatic assignment of the employee's rights against third parties. (Act of March 4, 1927, ch 509, 44 Stat. 1424) Because of abuses and the apparent hardship the automatic assignment worked on employees (*American Stevedores, Inc. v. Porello* [1946] 330 U.S. 446, 91 L.Ed. 1011, 67 S.Ct. 847) Section 33 was amended in 1938 to make payment of compensation under a formal award a prerequisite to a statutory assignment. (Act of June 25, 1938, ch 685, §12, 52 Stat 1168) Under the 1938 amendment, the employee was required to make an election whether to collect compensation under an award, or to pursue a third party action.

In 1959, Section 33 was again amended to correct additional abuses and the hardships the election of remedies imposed on the employee. (Senate Report No. 428, June 24, 1959, reproduced in the Supplement at p. 61.) The election of remedies was abolished and the six month automatic assignment provision was incorporated into Section 33. (33 U.S.C. §933(a) (b)).

[30] 295 U.S. at p. 226.

Congress clearly indicated its concern with double recovery in these comments directed to recoupment of compensation payments in the absence of a formal assignment made by the Senate Committee on Labor and Public Welfare regarding the 1959 amendments to Section 33:

> "Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation."[31]

To preclude double recovery, the unity of the cause of action must be presreved. This Court, then, has long recognized the unity of the third party cause of action where compensation payments are voluntarily made by an employer or its insurer. It also apparently recognized, however, that while Section 33 of the Act provides for the distribution of recovery when an employer or subrogated insurer institutes a third party action under formal assignment,[32] the Act makes no express provision for recovery of compensation payments voluntarily made by an employer or its insurer. Faced with preserving the unity of the cause of action and protecting the employer's interest in recouping compensation payments, this Court held in *Doleman* that an employer or its insurer that voluntarily pays compensation has a right of subrogation which entitles it to share *in the proceeds of the employee's recovery:*

> "The right of the employer to reimbursement from the recovery is derived from his subrogation under Section 33(b) of the Act to the rights of the

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[31] Senate Report No. 428, June 24, 1959, Text reproduced, Supplement at p. 61.

[32] Section 33(e); U.S.C. 933(e)

> [person] to whom he is bound to pay compensation. Apart from the statute, the indemnitor's right by subrogation to stand in place of his indemnitee, who is entitled to a part only of the proceeds of a single cause of action, does not carry with it any authority to maintain the action in his own name. * * * [citation ommitted] *He is in the position of a partial assignee of the chose in action, and as such is entitled to his share of the proceeds of the action when recovered . . .*"
>
> * * *
>
> Section 33(b) purports only to assign to the employer 'all rights of the person entitled to compensation to recover damages against such third person.' It operates to transfer to the employer only such rights as the dependent has. We do not doubt that this section, interpreted in the light of the indemnitor's common law right of subrogation confirms that right and is sufficient to give the employer as indemnity all the rights which the dependents electing to receive compensation otherwise would have . . ."[33] [Emphasis added]

Other federal courts have recognized this subrogation right of an employer voluntarily paying compensation and held it to create a lien on the employee's recovery, enforceable through intervention in the employee's third party suit. The most recent decision in this respect, and perhaps the most illuminating one on the origin and source of the subrogation lien is the Fifth Circuit Court of Appeals' decision in *Allen v. Texaco, Inc.*,[34] where these remarks were made:

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[33] 295 U.S. at pp. 255-226

[34] 510 F.2d 977 (5th Cir., 1975). The date of this decision was April 7, 1975, which was one month after the Fifth Circuit's original decision in *Louviere* (March 6, 1975). One member of the panel, Judge Bell, was also a member of the *Louviere* panel.

"There is no statutory counterpart of §933(e) where payments are made to an employee without a formal award of compensation being entered. The subrogation right where there is no award is a judicial creature with the statute as a rationale. In cases such as this one, where the employee himself sues the third party tortfeasor, the courts have long recognized a right of subrogation to the extent of payments made, and have permitted the employer or its insurer to intervene in the employee's suit to protect its right, even where compensation was paid without the entry of a formal compensation award. The Etna, 138 F.2d 37 (3rd Cir. 1943); Hugev v. Dampskisaktieselskabet International, 170 F. Supp. 601 (S.D. Cal 1959), aff'd sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet International, 274 F.2d 875 (9th Cir.), cert. denied, 363 U.S. 803, 80 S. Ct. 1237; 4 L.Ed. 2d 1147 (1960); Fontana v. Pennsylvania R.R., 106 F.Supp. 461 (S.D. N.Y. 1952); aff'd sub nom Fontana v. Grace Line, Inc., 205 F.2d 151 (2d Cir.) cert. denied, 346 U.S. 886, 74 S.Ct. 137, 98 L.Ed. 390 (1953). Thus, in The Etna, the eading case involving compensation without an award, the court stated:

> 'We find no intent indicated by the Act to take away from the employer who pays compensation without an award has right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Sec. 33(b) of the Act. *It is only the right of control of the employee's right of action against third persons which an employer foregoes*

> *by paying compensation without an award. His right to reimbursement out of the recovery for the employee's injury remains unaffected.*' 138 F.2d at 41." [Emphasis added][35]

The Fifth Circuit's remarks in *Allen v. Texaco Inc.* quoted above are consonant with the legislative history of the 1959 amendments to Section 33:

> "This bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. In the event that an employee does not elect to sue for damages within 6 months of the compensation award the employer is assigned the cause of action." (Emphasis added).[36]

And, perhaps most significant of all, are these additional comments of the Fifth Circuit Court of Appeals in *Allen v. Texaco, Inc.* to the effect that the Act does not purport to create any independent right in the employer or its insurer to recover compensation payments voluntarily made to an employee:

> "There is no indication that any independent right, i.e., other than a right of subrogation, was created in favor of the employer or its insurer. The decision in The Etna merely recognizes that the employer's right is one of subrogation to be asserted through the procedure of intervention in the employee's suit for the purpose of obtaining a lien on the recovery fund."[37]

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[35] 510 F.2d at pp. 979-980.

[36] Senate Report No. 428 (1959), reproduced in the Supplement at p. 61.

[37] 510 F.2d at p. 980.

The legislative history of Section 33 does indeed reflect the Congressional attitude that the employer or its insurer who voluntarily makes compensation payments in the absence of a formal assignment is *restricted* to reimbursement from the recovery of the employee in his third party action. Only in this fashion will the possibility of double recovery by the employee and multiplicity of litigation be avoided.

Morever, the Court of Appeals further misapprehended the statutory scheme in holding that the congressional objectives of providing prompt compensation would be frustrated unless the independent right of indemnification were recognized. Compensation benefits must commence under Section 14 of the Act "on the fourteenth day after the employer has knowledge of the injury . . . "[38] The 1959 amendments to Section 33 incorporated incentives to promote formal awards and statutory assignments of third party claims; this incentive was predicated upon the superior financial position of the employer to wage a third party campaign through formal assignment.[39] Where no statutory assignment occurs, however, the employer or its insurer surrenders the right to control the employee's third party action,[40] and thereby eletcs to entrust the timely filing of the third party action to the employee. This statutory scheme "carefully protects the interests of all who are involved and balances tthe equities."[41]

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[38] 33 U.S.C. §914(b).

[39] Senate Report No. 428 (1959), reproduced in Supplement, at p. 61. Significant, too, are these remarks in *Potomac Electric Power Company v. Wynn*, 343 F.2d 295, 297 (D.C. Cir., 1965) regarding the incentive effected by the 1959 amendments to "encourage the employee to permit assignment of his action [by formal award] in order to enlist the superior resources of the employer in suing the third party."

[40] *Allen v. Texaco, Inc., supra*, 510 F.2d 977, 980 citing *The Etna*, 138 F.2d 37 (3rd Cir., 1943).

[41] Senate Report No. 428, reproduced in Supplement at p. 61.

For these reasons, it is respectfully submitted that the Fifth Circuit Court of Appeals misapprehended the legislative history of Section 33 of the Act and the effect of decisions of this Court in interpreting the same. This Court must necessarily review the decision of the Fifth Circuit and consider the effect of the legislative history of Section 33 of the Act, including the 1959 amendments, and determine whether the Fifth Circuit erred in reversing the judgment of the District Court.

## CONCLUSION

For the foregoing reasons, petitioner respectfully prays that its petition for a writ of certiorari be granted.

September 30, 1975.

Respectfully submitted,

Charles D. Marshall

Charles D. Marshall, Jr.,
Counsel for Petitioner

## CERTIFICATE

I hereby certify that copy of the above and foregoing was mailed, postage prepaid, to the following counsel of record herein:

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New Orleans, Louisiana September 30, 1975

Charles D. Manheim

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

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RAYMOND D. LOUVIERE ET AL

vs.

SHELL OIL COMPANY ET AL

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CIVIL ACTION NO. 73-534 — SECTION "I"

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FINAL JUDGMENT UNDER RULE 54-B

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The motions of defendants, American Marine Corporation (previously Alexander Shipyards, Inc.), Texsteam Corporation, Avondale Shipyards, Inc., Insurance Company of North America, Therm-O-Disc, Inc., E. L. Wiegand Company, Pneumatic Service & Equipment, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Movible Offshore, Inc., Teledyne, Inc., Shell Oil Company, The Travelers Insurance Company and Superior Oil Company, to dismiss and/or for summary judgment having come on for hearing and the court h aving considered the pleading, exhibits, briefs and argument of counsel finds that the law and evidence are in favor of movers and for the written reasons assigned and entered on September 26, 1973:

IT IS ORDERED, ADJUDGED AND DECREED that the motions filed by movers enumerated above be and they are hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition herein filed against movers, American Marine Corporation (previously Alexander Shipyards, Inc.), Texsteam Corporation, Avondale Shipyards, Inc., Insurance Company of North America, Therm-O-Disc, Inc., E. L. Wiegand Company, Pneumatic Service & Equipment, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Movible Offshore, Inc., Teledyne, Inc., Shell Oil Company, The Travelers Insurance Company and Superior Oil Company, be and it is hereby dismissed with prejudice.

WHEREAS, there is no just reason for delay in rendering final judgment as to movers enumerated above:

IT IS ORDERED, ADJUDGED AND DECREED that pursuant to Rule 54-B, F.R.C.P., that this judgment be and it is hereby deemed a final judgment in this action as to movers, American Marine Corporation (previously Alexander Shipyards, Inc.), Texsteam Corporation, Avondale Shipyards, Inc., Insurance Company of North America, Thermo-O-Disc, Inc., E. L. Wiegand Company, Pneumatic Service & Equipment, Inc., Pacific Indemnity Company, Teledyne Movible Offshore, Movible Offshore, Inc., Teledyne, Inc., Shell Oil Company, The Travelers Insurance Company and Superior Oil Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that these proceedings be and they are hereby stayed as against all defendants except movers until de-

lays for all appeals have expired or, if appeals are taken, until final resolution by appellate courts.

New Orleans, Louisiana, this 12th day of December, 1973.

JACK M. GORDON
Judge, United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 73-534
SECTION "I"

RAYMOND D. LOUVIERE, ET AL
versus
SHELL OIL COMPANY, ET AL

Defendants, American Marine Corporation (previously Alexander Shipyards, Inc.); Texsteam Corp.; Avondale Shipyards, Inc.; Insurance Company of North America; Therm-O-Disc, Inc.; E. L. Wiegand Company; Pneumatic Service and Equipment, Inc.; Pacific Indemnity Company; Teledyne Momible Offshore; Movible Offshore, Inc.; Teledyne, Inc.; Shell Oil Company; Travelers Insurance Company and Superior Oil Company have filed motions to dismiss, in accordance with Rule 12(b) of the Federal Rules of Civil Procedure, the complaint of Raymond Louviere, or alternatively, motions for summary judgment pursuant to Rule 56. Movers predicate their respective motions on one principal fact: plaintiff Louviere's cause of action has prescribed.

On September 5, 1973, the Court entertained oral argument on the respective motions to dismiss. After completion of the oral argument of counsel, the Court granted said motions to dismiss, and concurrently, the Court orally stated its reasons for ruling, and indicated to the parties that supplemental written reasons would be issued at a later date. Accordingly, the Court will supplement its rationale presented in court with the following:

The parties agree that the Outer Continental Shelf Lands Act makes Louisiana law applicable, since the accident giving rise to Louviere's alleged cause of action occurred on a fixed platform located in the Gulf of Mexico more than one marine league from the Louisiana coast. *Chevron v. Huson*, 92 S.Ct. 349, 404 U.S. 97, 30 L.Ed.2d 296 (1971); *Rodrigue v. Aetna*, 89 S.Ct. 1834, 395 U.S. 353 (1969). The Louisiana prescriptive period for tort actions such as the one at bar is one year. Louisiana Civil Code, Article 3534. It is further undisputed by the parties that plaintiff Louviere filed this action more than one year after the accident.

In an attempt to avoid the effects of the Louisiana one year prescriptive period, Louviere contends that prescription as to his action was interrupted when Argonaut Insurance Company filed its suit [*Argonaut Ins. Co. v. Shell Oil Co.*, Civil Action No. 71-1265 (E.D.La.)] seeking reimubursement for the benefits paid to Louviere under the Longshoremen and Harbor Workers Act (LHWA) within the one year time period following the date of the accident. Thus, Louviere argues that he should not be barred by the statute of limitations in the present litigation.

Defendants argue that Argonaut's suit could not have interrupted the running of precsscription since it had no right of action to institute a suit for the reimbursement of funds paid by Argonaut under the Longshoremen and Harbor Workers Act. In support of their position, defendants point out that Argonaut did not pay Louviere LHWA benefits as a result of a formal award by the Commissioner; rather, the benefits were paid informally. Movers hasten to add that pursuant to Section 933 of

Title 33 United States Codes, the Longshoremen and Harbor Workers Act, an employer or the employer's insurer only has a right of action against a third party who could have caused the employee's injuries when two conditions are satisfied, to wit: (1) a formal award has been rendered by the Deputy Commissioner, and, (2) six months have elapsed since the rendition of the award.

Movers argue that the cases interpreting Section 933 make it clear that the injured employee has the exclusive right to institute suit against a third party tortfeasor until six months have elapsed following the rendition of an award by the Deputy Commissioner. While movers agree that the employer or insurer may intervene in a third party action filed by an injured employee at any stage, they contend that neither the employer nor the insurer may institute an action against a third party unless and until the aforementioned two conditions are met.

In support of their proposition, movers cite *Liberty Mutual Insurance Co. v. United States*, 290 F.2d 257 (2nd Cir. 1961) and *Joyner v. F. & B. Enterprises, Inc.*, 448 F.2d 1185 (D.C. Cir. 1971). In *Liberty Mutual Insurance Co.*, the Second Circuit did not allow a compensation insurer to file suit for benefits paid under a formal award where the statutory six month period had not yet expired. The insurer needed to file its suit prior to the running of the six month period because the action in that case would have prescribed after the expiration of the statutory six month period. The Court, nevertheless, held that the insurer did not have a right of action for reimbursement until the six months had elapsed.

In the case of *Joyner v. F. & B. Enterprises, Inc., supra*, the Court concluded that the employer or the employer's

compensation insurer does not retain a substantive right of action against the third party when compensation benefits are made without a formal award and the employee elects to commence an action against a third party.

The facts in the present case resemble a combination of the factual circumstances in *Liberty Mutual* and *Joyner*. Benefits were paid to Louviere absent a formal award, and subsequently, the compensation insurer instituted suit. The key question thus becomes: does the employer or its insurer have a substantive right of action against third parties. Defendants propose that there is no such right in ight of the reasoning stated in *Liberty Mutual*.

The Court must conclude, therefore, that inasmuch as Argonaut Insurance Co. did not pay Louviere pursuant to a compensation award by the Deputy Commissioner, there could not have been a statutory assignment of the plaintiff's claim against third parties to Argonaut Insurance Co. Therefore, Argonaut is unable to pursue as an assignee an independent right of action against third parties to recover sums paid to Louviere, and any suit which it might have filed in connection with a misconception of its rights could not have had the effect of interrupting prescription in favor of plaintiff.

The basic philosophy suggested by 33 U.S.C. §933 indicates that the courts will allow the employer or its insurer a setoff, by means of subrogation, to the extent of compensation paid to avoid double recovery. This approach to recovery requires that the employee sue third parties in accordance with the state statute of limitations, and, then, the compensation insurer be permitted to intervene for its claim in the employee's suit.

Failure of Argonaut to make payment without a formal award to Louviere requires that Argonaut forego its possible right of control over the employee's (Louviere's) right of action against third parties. Nevertheless, Argonaut's right to reimbursement out of any recovery that Louviere might obtain against third parties remains unaffected. *Cf. Ruggiero v. Rederiet for M/S Marion*, 308 F.Supp. 798 (S.D.N.Y. 1970).

Plaintiff suggests to the Court that the decision of *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 89 S.Ct. 1144, 394 U.S. 404 (1969), permits this suit by Louviere upon recognition of Argonaut's independent right of action against third parties, regardless of Argonaut's compliance or lack thereof with the LHWA provisions. In *Burnside*, a longshoreman was fatally injured in the performance of his duties aboard ship, and the decedent's representative instituted suit against Burnside, the owner of the vessel. Burnside, in turn, filed a third party action against the decedent's employer, Federal Marine Terminals, Inc., to obtain indemnity under the *Ryan* doctrine. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 350 U.S. 124, 76 S.Ct. 232 (1956). Federal Marine Terminals, Inc., the stevedore, asserted a counterclaim against Burnside, the vessel owner, attempting to recover amounts expended and to be expended in the payment of benefits to the survivor under the Longshoremen and Harbor Workers Act. The stevedore's counterclaim was activated by the fact that the survivors' claim against the ship was limited by state law to a maximum amount of $35,000. The stevedore's exposure, therefore, was substantially greater than the statutory limit that attached to the survivors' possible recovery. Reversing the District Cour and the Court of Appeals, the Su-

preme Court in *Burnside* held that the right to sue as a subrogee pursuant to the LHWA was not the eexclusive remedy of the stevedore, but, that the stevedore was entitled to assert an independent cause of action against the vessel owner for the latter's negligence.

The *Burnside* case is plainly distinguishable from the case sub judice both factually and legally. From a factual standpoint, the complaint filed by Argonaut in Civil Action No. 71-1265, *Argonaut Insurance Co. vs. Shell Oil Company*, (E.D. La.) alleges no direct action in tort against any of the defendants. Rather, Argonaut has limited its demand to that of seeking recovery through subrogation through the LHWA.

With respect to the legal distinction between these two cases, the Court concludes, in light of the factual situation, that Argonaut, even if it had desired, could not have pursued an independent right of action against third parties, since no independent right of action exists. *Burnside* does not constitute legal authority for application of the doctrine allowing an independent right of action beyond cases which involve the triad of stevedore-longshoreman-vessel owner *See generally, Liberty Mutual Insurance Co. v. Fruehauf Corp.*, 472 F.2d 69 (6th Cir. 1972). It also should be noted that the courts have been reluctant to extend the recognition of the special legal relationship of *Ryan* on the theory of implied warranty of workmanlike services beyond this tripartite relationship. *Cf. Ocean Drilling & Exploration Company v. Berry Bros. Oilfield Service*, 377 F.2d 511 (5th Cir.), cert. denied, 389 U.S. 849, 88 S.Ct. 102 (1967).

In summary, the Court concludes that the holding of *Liberty Mutual Insurance Co. vs. United States, supra,*

controls the present case, thereby reducing plaintiff's claim against third parties to one that is barred by prescription, since the institution of Argonaut's suit for reimbursement of benefits paid under the LHWA can have no effect on the interruption of prescription for Louviere.

Accordingly, IT IS ORDERED that the motions to dismiss by defendants, American Marine Corporation (previously Alexander Shipyards, Inc.); Texsteam Corp.; Avondale Shipyards, Inc.; Insurance Company of North America; Thermo-O-Disc, Inc.; E. L. Wiegand Company; Pneumatic Service and Equipment, Inc.; Pacific Indemnity Company; Teledyne Movible Offshore; Movible Offshore, Inc.; Teledyne, Inc.; Shell Oil Company; Travelers Insurance Company and Superior Oil Company, are hereby GRANTED.

s/JACK M. GORDON

IN THE
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

NO. 73-3686

RAYMOND D. LOUVIERE ET AL.,
Plaintiffs-Appellants,

versus

SHELL OIL COMPANY ET AL.,
Defendants-Appellees.

March 6, 1975

Before WISDOM and BELL, Circuit Judges, and BREWSTER, District Judge.

WISDOM, Circuit Judge.

Raymond Louviere was injured when a hot water heater exploded in the living quarters of a fixed platform in the Gulf of Mexico. Almost three years after the explosion, he filed suit for damages. The district court dismissed his suit, holding that his claim had prescribed Louviere appeals, alleging that a suit filed by his employer's workmen's compensation carrier against the same defendants interrupted the running of prescription. We reverse and remand.

Louviere was employed by Movible Offshore, Inc. as a cook in the living quarters of a fixed platform located on the Outer Continental Shelf off the Louisiana coast. On May 6, 1970, a hot water heater exploded injuring

some workers and killing others. Louviere suffered broken ribs, a broken collar bone, an injured back, and burns. After surgery on his back, he returned to work from time to time but on each occasion found himself unable to continue working. A psychiatrist concluded that the explosion had caused multiple trauma, and that Louviere later suffered an anxiety neurosis and depression. He has, allegedly, had severe pain from his injuries and has had episodic crying spells. He now asserts that he is totally and permanently disabled.

After the accident, Movible Offshore's compensation carrier, Argonaut Insurance Company, paid Louviere benefits under the terms of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901 et seq. Because Movible Offshore did not contest Louviere's right to compensation, benefits were paid without entry of an award by the deputy commissioner. Argonaut, as Movible's subrogee,[1] then filed a suit in federal district court on May 5, 1971, seeking reimbursement for workmen's compensation benefits paid as a result of the explosion. The complaint named as defendants, the owner of the platform, the manufacturers and sellers of the heater and some of its components, and the builder of the living quarters.

The complaint alleged that the negligence of the defendants was the proximate cause of the explosion; that certain employees were injured or killed in the explosion; that, as a result of the explosion, Argonaut had become obligated to pay workmen's compensation benefits to those

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[1] An insurer paying workmen's compensation benefits under the Act, is subrogated to the employer's interests to the extent of benefits paid. 33 U.S.C. § 933(h). *Cf.* Hartford Accidentt & Indemnity Co. v. Byles, La.App. 1973. 280 So.2d 624.

employees under the Longshoremen's and Harbor Workers' Compensation Act; and that, under the provisions of the Act, it was entitled to recover against the defendants all the benefits it had paid or might become obligated to pay.

[1] On February 27, 1973, while Argonaut's suit was pending but before trial Louviere filed suit, seeking to recover damages from the same defendants, alleging their negligence as the cause of his injuries[3] The defendants filed a plea of prescription, alleging that the one year prescriptive period allowed under Louisiana law for suit on a tort claim had passed and that Louviere's claim was barred. They argue that Argonaut's suit was not effective to interrupt prescription because it was barred by provisions of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S. § 933.

The Louisiana one year period of limitations governing personal injury actions, Art. 3536, La.Civ.Code Ann., is applicable to this action. Chevron Oil Co. v. Huson, 1971, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.[4] Also governing, in the absence of applicable federal law, is

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[2] The district court dismissed Argonaut's independent suit on June 6, 1974. The reason given in the minute entry was that the compensation payments were not made under a formal award.

[3] Argonaut's suit also named Movible Offshore as a defendant. Because an employer's liability under the Act is exclusive of all other liability to the employee, Movible should be dismissed from the suit. 33 U.S.C. § 905.

[4] Jurisdiction of this action is grounded on 43 U.S.C. § 1333, the Outer Continental Shelf Lands Act, which extends coverage of the Longshoremen's and Harbor Workers' Compensation Act to accidents taking place on fixed platforms such as the one involved here. 43 U.S.C. § 1333(c). The law applicable to these structures is the federal law of the United States and the law of the adjacent state applied as federal law in the absence of inconsistent federal law. 43 U.S.C. § 1333(a)(2); Rodrigue v. Aetna Casualty & Surety Co., 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360.

LSA-R.S. 9:5801, providing for interruption of prescription by the filing of a suit.[5]

The appellees seek to avoid application of this rule in favor of Louviere, by invoking the rule that a suit that "does not state any right or cause of action whatsoever" will not interrupt prescription. Callendar v. Marks, Sup. Ct.1936, 185 La. 948, 952, 171 So. 86, 87. They contend that Argonaut's suit falls within this rule, because Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933 contemplates that an employer may sue a third party only where he has paid compensation benefits under an award entered by the deputy commissioner. They would thus have us impute to the assignment provision of Section 33 an exclusory effect, preempting any nonstatutory remedies otherwise available to an employer to recoup from a third party tortfeasor compensation benefits paid under the Act. Louviere argues that, although Section 33 makes the right to sue as a statutory assignee contingent on payment of compensation under an award, it was not designed to supplant parallel, nonstatutory remedies available to the employer and did not bar Argonaut's suit, as the employer's subrogee.

The threshold questions we must consider are whether Section 33 of the Act preempts whatever nonstatutory rights of action an employer might have for compensation payments to an employee, and if not, whether the employer does, in the absence of a statutory bar, have such a right of action in the circumstances this case presents, and whether suit to enforce such a right is effective to

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[5] This provision reads:

"The filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon, against all defendants, including minors and interdicts." LSA-R.S. 9:5801.

interrupt prescription of the employee's claim for damages.

I.

The contention that Section 33 of the Act should be construed as providing the sole remedy of an employer against third persons, preempting other nonstatutory remedies, was addressed and rejected in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 1969, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371. There a longshoreman had been killed by a fall into an unguarded hatch. His widow, after accepting compensation under an award, filed a wrongful death action against the shipowner, Burnside, within six months of the award. Burnside, in turn, filed a separate action in the same federal court seeking indemnification from Marine Terminals, the longshoreman's employer. Marine Terminals, then counterclaimed against Burnside for "all sums which have been paid or will be paid" as compensation benefits, alleging that Burnside, as owner and operator of the vessel, had breached its duty to the stevedore to provide a safe place of work, causing the death which triggered the stevedore's statutory obligation to pay compensation. The district court dismissed the counterclaim and the court of appeals affirmed, both reasoning that the statutory remedy was exclusive and that the employer could not sue except as a statutory assignee.

The Supreme Court reversed. First, it held that Section 33 of the Act is not the exclusive source of an employer's remedies to recoup compensation payments from negligent third parties. The keystone of its analysis was that Section 33 "gave the employer, in return for his absolute liability to the [employee], part of the latter's

rights against others" and "the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect." 394 U.S. at 412, 89 S.Ct. at 1149. The Court, looking to the language of the statute and its legislative history, found nothing to suggest a purpose to limit the employer's remedy against third persons to assignment to the rights of the compensated employee. The Court particularly observed that whereas Congress had explicitly made the employer's absolute liability, for compensation exclusive of any tort liability it attached no such exclusivity to the employer's right to sue third parties as the assignee to the rights of the employee.

Liberty Mutual Insurance Co. v. United States, 2 Cir. 1961, 290 F.2d 257, and Joyner v. F. & B. Enterprises, 1971, 145 U.S.App.D.C. 262, 448 F.2d 1185, on which the appellees rely, are, we conclude, inconsistent with *Burnside*. *Liberty Mutual* involved the same longshoreman-stevedore-shipowner triangle that was present in *Burnside*. The stevedore's compensation carrier paid benefits to the employee under an award. When the employee failed to sue, the employer filed suit against a third party, four months after the award, but only eleven days before his suit would have been barred by the governing statute of limitations. Had he waited the statutory period of six months, to file as a statutory assignee, his claim would have been barred. Chief Judge Lumbard, in dissent, argued that although the employer was not entitled to sue as a statutory assignee until six months after the award, he should be permitted to seek recoupment as an equitable subrogee. His line of reasoning, similar to that of the Court in *Burnside*, was that the statutory assignment of rights granted by Section 33 conferred an additional remedy on the employer but did not preempt pre-existing nonstatutory remedies. Neverthe-

less, the majority upheld the dismissal of the employer's suit, finding that, absent statutory assignment, neither the employer nor its subrogated compensation carrier was entitled to initiate an action against an alleged third party tortfeasor.

The Court of Appeals for the District of Columbia reached the same conclusion in Joyner v. F. & B. Enterprises, 1971, 145 U.S.App.D.C. 262, 448 F.2d 1185. There the defendant in a suit filed by the employee attempted to join the employer, who had paid compensation without an award, as a real party in interest under Rule 17 of the Federal Rules of Civil Procedure. The court upheld the denial of joinder, on the ground that an employer who pays compensation without an award lacks a substantive right to sue a third party for reimbursement of benefits paid. In such circumstances, the court concluded, as had the court in *Liberty Mutual*, that the employer's only right was to reimbursement out of his employee's recovery against third parties—a remedy the courts have found implicit in the statutory scheme, although it is not specifically granted by the statute. See Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143; The Etna, 3 Cir. 1943, 138 F.2d 37.

Both decisions appear to impute to Section 33 an exclusory effect. To this extent they are, we conclude, inconsistent with the holding and reasoning of *Burnside*. Both appear to have decided that recognition of an independent, non-statutory right of action would be inimical to the legislative purpose evidenced by the statutory scheme. *Burnside* apart, we find a general poverty of support for that conclusion.

First, courts and commentators have recognized the objective under the Act of "placing the burden ultimately

on the company whose default caused the injury." Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 324, 84 S.Ct. 748, 754, 11 L.Ed.2d 732, cited in *Burnside*, 394 U.S. at 420, n. 22, 89 S.Ct. 1144, 22 L.Ed2d 371. See generally, 2 Larson's Workmen's Compensation Law §§ 71 and 76 (Cum.Supp.1974). Similarly, a recognized purpose of the Act is "to protect employers who are subjected to absolute liability by the Act." Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. at 412, 74 S.Ct. at 206.

Section 33, if exclusive, is manifestly incapable of advancing these related objectives. One commentator has identified nine distinct situations where a holding that the Section 33 remedy is exclusive would "deprive the employer of a valuable prior remedy and present the third party with a gratuitous immunity." 2 Larson's Workmen's Compensation Law § 77 at 250.102—.103 (Cum. Supp. 1974). At that commentator aptly admonishes, "before a statutory remedy is construed to be an implied abolition of all antecedent remedies, it should be shown that the new remedy covers the ground previously dealt with by the old, without substantial lacunae where nothing is put in the place of the remedy abolished." *Id.* at 250. 102. Section 33 does not meet this test.

The statutory scheme is also designed to assure prompt and certain payment of benefits to the injured employee. To this end, the Act provides:

> (a) "Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

> (b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death . . . " 33 U.S.C. § 914.

The Act thus directs that compensation shall ordinarily be paid to an injured employee without an award. The manifest purpose is to assure prompt aid to the employee when his need is greatest. See American Stevedores, Inc. v. Porello, 1946, 330 U.S. 446, 455-56, 67 S.Ct. 847, 91 L.Ed. 1011. To predicate the employer's right to sue for indemnity on payment under an award would tend to discourage the prompt and voluntary payment of compensation that the Act contemplates, since the employer would be compelled to controvert his obligation to pay compensation, to force an award and protect his right to pursue a remedy against third parties. Certainly we find no merit in the appellee's suggestion that by making statutory assignment contingent on payment of compensation under an award, Congress implied disfavor of voluntary payment and intended to deprive an employer who pays compensation voluntarily of his independent remedies against wrong-doing third parties.

This limitation on statutory assignment was imposed for a specific and limited purpose. Section 33, as originally enacted, provided that acceptance of compensation worked a complete assignment to the employer of all the employee's rights against third persons. Act of March 4, 1927, ch. 509, 44 Stat. 1424. This right was granted "in aid of the employer", not as a limitation on his right to nonstatutory recoupment. The Etna, 3 Cir. 1943, 138 F.2d 37, 40. But the effect of the assignment was to deprive the employee of any right to sue on his own behalf. His claim was thereby entrusted to his employer, who was

entitled to file suit, or to compromise the claim, but whose interest in pursuing it was not always sufficient to make him a satisfactory representative of his employee's interests. In 1938, the Act was amended to make payment of compensation under an award a prerequisite to statutory assignment, with "the apparent purpose . . . to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election." American Stevedores, Inc. v. Porello, 1946, 330 U.S. 446, 456, 67 S.Ct. 847, 852, 91 L.Ed. 1011. Act of June 25, 1938, ch. 685, § 12, 52 Stat. 1168.

The thrust of the amendment was thus to protect the employee against premature and unwitting surrender to his employer of his right to sue on his own behalf. See H.R.Rep.No.1945, 75th Cong., 3d Sess. 9 (1938); S.Rep. No.1988, 75th Cong, 3d Sess. 9 (1938). It attempted to do so by preserving the employee's right to sue on his claim. But there is nothing to suggest that the amendment was intended to divest the employer of his right to sue on his own behalf for recoupment from the party at fault. Nothing in that right is prejudicial to the right of the employee to pursue his own remedy. The employer's suit or settlement would in no way bind the employee or prevent him from enforcing his own rights.

In short, we find nothing in the statutory scheme or its legislative history that requires leaving the employer who voluntarily pays compensation without a remedy against culpable third parties. On the contrary, we conclude that such a holding would frustrate the congressional objectives of providing prompt compensation to injured employees and of placing the ultimate burden of

loss on the party at fault. We therefore hold that in the circumstances this case present the employer who pays compensation without an award is not barred by Section 33 from pursuing whatever nonstatutory rights he may have against third party wrongdoers.

## II.

We must also disagree with the district court's apparent conclusion that Argonaut had no right of action for recoupment sufficient to interrupt prescription of Louviere's claim, even in the absence of a statutory bar to assertion of nonstatutory remedies. We conclude that the employer, or as here, his subrogated insurer, is entitled to indemnity from a wrongdoing third party.

Louisiana law is determinative of this question of nonstatutory recoupment. That law, no less than the common law, is fundamentally hostile to unjust enrichment. See, e. g., La.Civ.Code Art. 1965 (1870). Louisiana courts have, accordingly, long recognized an action for indemnity, although its codal basis has been a source of some dispute.[6] Indeed, the courts have recognized an independent nonstatutory right of an employer paying workmen's compensation benefits to recoup those payments from a wrongdoing third party. See, e. g., London Guarantee

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[6] A number of different theories have, over the years, been advanced by the Louisiana Supreme Court to support an action for indemnity in circumstances similar to these present in this case—among them direct action in tort under Article 2315, quasi-contract, and legal subrogation. *See, for example,* Appalachian Corporation v. Brooklyn Cooperage Co., 1922, 151 La. 41, 91 So. 539; Foster & Glassel Co. v. Knight Bros., 1922, 152 La. 596, 93 So. 913; London Guarantee Accident Insurance Co. v. Vicksburg, S. & P. R. Co., 1923, 153 La. 287, 95 So. 771; Marquette Casualty Co. v. Brown, 1958, La. 245, 103 So.2d 269. *See generally,* Minyard v. Curtis Products, Inc., 1967, 251 La. 624, 205 So.2d 422. *But see,* Forcum-James Co. v. Duke Transportation Co., 1957, 231 La. 953, 92 So.2d 228.

Accident Insurance Co. v. Vicksburg, S. & P. R. Co., 1923, 153 La. 287, 95 So. 771; Foster and Glassell Co. v. Knight Brothers, Inc., 1922, 152 La. 596, 93 So. 913. Although these cases have been disavowed as inconsistent with the statutory scheme of the Louisiana Workmen's Compensation Act, the validity of the principle they embody is not challenged. *See* Minyard v. Curtis Products, Inc., 1967, 251 La. 624, n. 2, 205 So.2d 422, 430, n. 2.[7] More recently, in a suit for indemnity by a subcontractor against the manufacturer of defective materials, the Louisiana Supreme Court reconsidered the theoretical basis of the action in indemnity. Minyard v. Curtis Products, Inc., 1967, 251 La. 624, 205 So.2d 422. Surveying recent decisions, the Court concluded that the principles proscribing unjust enrichment "were the underlying reasons for the decision of those cases which have allowed recovery under the concept of indemnity" and that later cases have "more properly characterized the action for indemnity as an action or claim in quasi contract for unjust enrichment." 205 So.2d at 431. "Under this general theory of quasi contractual obligations founded upon an unjust enrichment", the Court cited the "corrective or supplementary" civil law remedy of the action *de in rem verso* as the proper theory of recovery. The elements of this action, as elaborated by the courts in France, and applied in *Minyard* are: (1) there must

[7] Some of these decisions have come upon hard times as of late. *London Guarantee* has been overruled to the extent that it permits an unsubrogated insurer to sue for what is in effect "damage sustained by reason of a contractual obligation." Forcum-James Co. v. Duke Transportation Co., *supra*, 231 La. at 962, n. 3, 93 So.2d at 231, n. 3. The authority of *London Guarantee*, as well as of *Foster & Glassell* was further undermined in Marquette Casualty Company v. Brown, 1958, 235 La. 245, 103 So.2d 269, to the extent that they suggested that a nonstatutory right to recoupment survived the enactment of the parallel statutory right of action. 235 La. 245, n. 3, 103 So.2d at 272, n. 3. Nevertheless, the reasoning of these cases may survive to the extent that it does not run afoul of a specific statutory scheme. *See* Minyard v. Curtis Products, Inc., 1967, 251 La. 624, n. 2, 205 So.2d 422, 430, n. 2.

be an enrichment, (2) there must be an impoverishment, (3) there must be a connection between the enrichment and resulting impoverishment, (4) there must be an absence of "justification" or "cause" for the enrichment and impoverishment and finally (5) there must be no other remedy at law. 205 So.2d at 432. See Nicholas, Unjustified Enrichment in Civil Law, Part I, 36 Tul.L. Rev. 605, 610 (1962).

Argonaut's complaint, we conclude, alleged facts sufficient to support relief under this theory; alleging specifically that the fault of the defendants injured the employee whom the plaintiff then became obligated to, and did in fact, compensate. Thus the alleged tortfeasors were enriched at the expense of the employer's subrogated insurer, without legal justification.

III.

The remaining question is whether the suit filed by Argonaut interrupts prescription of the employee's right of action against the same defendants. We are compelled, by decisions of the Louisiana Supreme Court, to hold that it does. Most directly pertinent is the decision in National Surety Corp. v. Standard Accident Insurance Co., 1965, 247 La. 905, 175 So.2d 263.

There the employer's subrogated insurer had paid benefits to an injured employee pursuant to the Louisiana Workmen's Compensation Act and had subsequently filed a suit against an alleged third party tortfeasor seeking recovery of the amount paid.[8] More than one year

[8] The employer is guaranteed the right to sue on his own behalf by the statute. LSA-R.S. 23:1101. He does not, however, sue as a subrogee whose rights are derivative of those of his employee. The statute is held to grant him an independent right of action against wrongdoing third parties. Marquette Casualty Co. v. Brown, 1958, 235 La. 245, 103 So.2d 269; Board of Commissioners of Port of New Orleans v. City of New Orleans, 1953, 223 La. 199, 65 So.2d 313.

after the accident, the employee intervened in the action, seeking damages, and the defendant pleaded prescription. The court held that the prescription running in favor of the tortfeasor was interrupted as to the injured employee by the timely filing of suit by the employer's compensation carrier. The employee's claim, the court concluded, was on the same cause of action, for purposes of LSA-R.S 9:5801, as the employer's carrier's suit. "Cause of Action", for those purposes, was defined as "an act on the part of a defendant, which gives rise to a plaintiff's cause of complaint". 175 So.2d at 266. This analysis, the court held, was unaffected by the fact that the employee's claim had not been included in the original suit and substantially increased the aggregate demand against the defendant. Increased demand, the court noted, does not betoken a new cause of action. The court emphasized that, although the employee had been neither present nor represented in the original action, *all prescriptions* affecting the cause of action sued upon are interrupted as to all defendants by the commencement of a civil action in a court of competent jurisdiction." 175 So.2d at 268.

The Louisiana Supreme Court, in a recent decision, has reaffirmed the reasoning and result of *National Surety* and overruled a court of appeals decision that attempted to narrow its implications. Nini v. Sanford Brothers, Inc., La.1973, 276 So.2d 262, overruling American Surety Insurance Co. v. Insurance Company of North America, La.App.1969, 220 So.2d 163. The state court of appeals had held that a suit by one insured against another for the deductible portion of its losses did not interrupt prescription to permit a subsequent suit by the plaintiff's subrogated insurer against the defendant's insurer for amounts expended under its policy. *National Surety*, the court concluded, could not be read as extending the effect

of interruption in favor of "*all* potential plaintiffs." 220 So.2d at 165. Furthermore, the court reasoned, *National Surety* was distinguishable as the plaintiff there had filed a timely intervention pursuant to specific provisions of the Louisiana Workmen's Compensation statute.

The Supreme Court in *Nini* found this reasoning inconsistent with *National Surety*. 276 So.2d at 266, n. 6. It underscored *National Surety*'s emphasis of the rule that "*all* prescriptions affecting the cause of action therein sued upon are interrupted as to *all defendants*". 276 So.2d at 266. And it cited *National Surety* for the broad proposition that the effect of interruption of prescription was to be determined by the effect of the original petition in giving notice to the defendant of a claim arising out of the same cause of action, *viz.* the same set of operative facts. In broad language, the Court observed that "the essence of interruption of prescription by suit has been notice to the defendant of legal proceedings based on the claim involved" so that prescription is interrupted "[w]hen the defendant knows or should know, prior to the expiration of the prescriptive period, that legal demands are made upon him from the occurrence described in the petition filed". 276 So.2d at 264-65.

In another context we might be loathe to take the broad language of these opinions of the Louisiana Supreme Court at face value.[9] But the analogy of Louisi-

[9] A persuasive argument might be made that the holding of *National Surety* should not be extended beyond the special statutory context in which it arose. There was a line of authority to the effect that "[f]rom a single tortious injury to an employee there arises but one cause of action . . . and all damages flowing therefrom, which may include several different and distinct elements, are recoverable in one and the same suit." Board of Commissioners v. City of New Orleans, 1953, 223 La. 199, 65 So.2d 313, 314-15; Marquette Casualty Co. v. Brown, 1958, 235 La. 245, 103 So.2d 269. Indeed, the Court in *National Surety* placed substantial reliance on these cases, while inserting

ana Workmen's Compensation Law to the Longshoremen's and Harbor Worker's Compensation Act persuades us that *National Surety* and *Nini* should control the disposition of this appeal. We conclude, accordingly, that suit by the employer's subrogated insurer to recover benefits paid an injured employee under the Longshoremen's and Harbor Worker's Compensation Act will interrupt prescription to permit a subsequent suit by the employee for his damages arising out of the same occurrence. The employer-employee nexus under the Act assures that suit by the employer, or by his subrogated insurer, will necessarily include allegations of injury to its employee, and thereby give clear notice to the defendants of the potential claim of that employee.

We therefore hold that Argonaut's suit was effective to interrupt prescription of Louviere's claim. In so holding, we imply no opinion as to the merits of Louviere's claim or, for that matter, the claim of Argonaut. We reverse the judgment of the district court and remand this case for further proceedings consistent with this opinion.

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language with broader implications. The narrower view would, it appears, be most consistent with traditional jurisprudence, holding that prescription is interrupted only as to those persons who are parties or privies to the original action. See, e. g., Geisenberger v. Cotton, 1906, 116 La. 651, 40 So. 929; Becnel v. Waguespack, 1888, 40 La.Ann. 109, 3 So. 536; Flower v. O'Connor, 1841, 17 La. 213; Blanc v. Dupre, 36 La.Ann. 847. Under this view, the general test of interruption of prescription by filing of suit has been not only notice to the defendant of the plaintiff's claim but also of *his intention to assert it.* See Comment, 9 Tul.L.Rev. 285, 286.

Nevertheless, the Court in *Nini* has, to all appearances, rejected this narrower view. There *National Surety* was not treated as a narrow exception carved out of the general rule but as illustrative of the general rule itself. It is notice not of the plaintiff's intention to assert his demand, but of any demand stemming from the same tortious occurrence or conduct, which interrupts prescription as to subsequent demands on that "cause of action," at least to the extent that the first demand sufficiently implies the second. Thus, the narrower view of *National Surety*, whatever its intrinsic merit, is not the current view of the Louisiana Supreme Court.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 73-3686

July 3, 1975

RAYMOND D. LOUVIERE ET AL.,
Plaintiffs-Appellants,

versus

SHELL OIL COMPANY ET AL.,
Defendants-Appellees.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion March 6, 1975, 5 Cir., 1975,
509 F.2d 278)

Before WISDOM and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

American Marine Corporation, an appellee, has raised in its petition for rehearing a number of contentions which we have considered and found unpersuasive. It argues first that the Supreme Court's holding in Doleman v. Levine, 295 U.S.221, 55 S.Ct. 741, 79 L.Ed. 1402 bars an employer who is not a statutory assignee from maintaining an action in indemnity against a wrongdoing third party. This argument was considered and rejected in *Burnside.* Federal Marine Terminals, Inc. v. Burnside Shipping Co., 1969, 394 U.S. 404, 413, n. 13, 89 S.Ct. 1144, 1149, 22 L.Ed.2d 371, 379. Another con-

tention raised is that this Court erred in adopting Louisiana law as surrogate federal law. The Outer Continental Shelf Lands Act provides, however:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon. . . ."

43 U.S.C. § 1333(a)(2). These structures are thus "to be treated as islands or as federal enclaves within a landlocked State. . . ." Rodrigue v. Aetna Casualty & Surety Co., 1969, 395 U.S. 352, 361, 89 S.Ct. 1835, 1840, 23 L.Ed.2d 360, 367. "Congress specifically rejected national uniformity and specifically provided for the application of state remedies. . . ." Chevron Oil Co. v. Huson, 1971, 404 U.S. 97, 104, 92 S. Ct. 349, 354, 30 L.Ed.2d 296, 304. As we stated in our earlier opinion, adoption of the Louisiana law of indemnity does not conflict, but rather furthers the policies underlying the Longshoremen's and Harbor Workers' Compensation Act. Louviere v. Shell Oil Co., 5 Cir. 1975, 509 F.2d 278, 282-84. We have not been persuaded to reconsider that conclusion. Nor have we been persuaded that we erred in adopting the Louisiana law of prescription. See generally, Chevron Oil Co. v. Huson, 1971, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296.

For the foregoing reasons, and because no member of this panel nor judge in regular active service on the Court has requested that the Court be polled on rehearing en banc, the Petition for Rehearing and Rehearing En Banc is denied. See Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12.

# HARBOR WORKERS—COMPENSATION—THIRD PARTY LIABILITY

Senate Report No. 428, June 24, 1959

[To accompany H.R. 451]

House Report No. 229, Mar. 19, 1959

[To accompany H.R. 451]

The Senate Report is set out.

## Senate Report No. 428

THE Committee on Labor and Public Welfare, to whom was referred the bill (H.R. 451) to amend the Longshoremen's and Harbor Workers' Compensation Act, with respect to the payment of compensation in cases where third persons are liable, having considered the sam, report favorably thereon with an amendment and recommend that the bill as amended do pass.

## BACKGROUND OF THE BILL

Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of cetain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardles of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.

Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment. This section also reserves to the employee the right to recover damages against third parties causing injury.

However, in exercising his right to sue a third party for damages under section 33 of existing law, the employee must choose whether to collect the compensation to which he is entitled or to pursue the third-party suit. He may not pursue both courses.

Existing law works a hardship on an employee by in effect forcing him to take compensation under the act because of the risks involved in pursuing a lawsuit against a third party. His compensation under the act is certain but his chances of winning a third-party liability suit are uncertain. In these circumstances an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit. Circumstances like these are ready made for the unscrupulous who have been known to "stake" an injured employee while pursuing a damage suit—those who, in effect, purchase an injured employee's claim for their own monetary advantage.

## PURPOSE OF THE BILL

The bill as amended by the committee would revise section 33 of the act so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation under the act. The principle underlying the modification of the law made by this bill, is embodied in most modern State workmen's compensation laws. The

committee believe that in theory and practice this is sound approach to what has been a difficult problem. As embodied in the committee amendment, the principle would be applied with due recognition of the equities and rights of all who are involved.

Although an employee could receive compensation under the act and for the same injury recover damages in a third-party suit, he would not be entitled to double compensation. The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the net proceeds of the recovery. In the event that an employee does not lct to sue for damages within 6 motnhs of the compensation award the employer is assigned the cause of action. In the event that the employer institutes proceedings and makes a recovery, the employee receives four-fifths of the amount after necessary expenses, approved by the Deputy Commissioner, and all benefits and compensation have been deducted. Thus by giving the employer a reasonable (one-fifth) share in the net recovery an incentive is provided not to compromise a suit only for the amount of compensation but to protest the interests of the employee as much as possible.

The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rationale of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that he might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where

he negligently injures a fellow worker. It simply means that rights and liabilities arising within the "employee family" will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.

The bill as amended by the committee provides greater protection to injured workers and corrects defects in existing law. It carefully protects the interests of all who are involved and balances the equities. The bill as amended has the support of both labor and industry and the endorsement of both the Labor Department and the Bureau of the Budget. The views of the executive agencies are expressed in the letters which follow:

U. S. Department of Labor,
Office of the Secretary,
*Washington, May 1, 1959.*